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No. 93-2024

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FREEDOM REPUBLICANS, INC. and
LUGENIA GORDON, PRESIDENT,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY MEMORANDUM

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The brief of the Federal Election Commission (FEC) misinforms the Court regarding the record below, and misstates the claim of discrimination.

The first question before this Court is whether Article III standing to initiate a claim under Title VI of the Civil Rights Act of 1964, before a federal agency refusing to adopt regulations as required by the statute, necessitates a showing that federal funding caused, and its termination would redress, the alleged injury. FEC failed to raise this objection in the trial court. Without any factual record, the Court of Appeals held that such a showing was impossible, as the

challenged delegate rules derived from purely political considerations and it was "speculative" that the Party would choose to amend its rules rather than forego federal funding.

Although the Court of Appeals did not focus on the actual complaint, FEC now urges that the complaint's failure to allege causation and redressability is fatal. However, the complaint itself *did* allege a connection between federal funding and the alleged injury, to the effect that "Plaintiffs are harmed by the failure of the defendant to . . . restrain the expenditure of funds," para. 29, and seeking as redress that "the FEC require that no Federal funds in the possession or control of the Republican National Committee be spent until the RNC has complied with Title VI." (Prayer no. 4)

The complaint did not address facts on which the Court of Appeals based its finding of political rather than economic causation because no such facts were presented until the RNC filed its brief *amicus curiae* on appeal. Petitioners moved to strike this account as outside the record.

The claim of discrimination stated by FEC at 3-4 is that "delegates are allocated to each state delegation based partly on the state's success in electing Republican candidates and its support of the Republican candidate in the previous presidential election." This is not the claim, but rather the rationale for the challenged rules advanced by the RNC in its *amicus* brief below. Petitioners contend that this is a pretext, since the rules do not in fact reward such success. *See* Petition for Certiorari at 16-17 n.12.

The complaint detailed the amount and uses of federal funds, and connected them with specific allegations of disparate conduct and how they violate the statute and model regulations. Complaint, paras. 6-11, 24-29. FEC's argument seems to be that a complaint must allege facts that *might* be needed to rebut a recipient's pretext for disparate conduct, indeed to rebut what *might* be submitted on appeal in an *amicus* brief, to meet the standards of Article III.

Moreover, FEC ignores entirely the claim of disparate treatment of African Americans through the use of official party auxiliaries. It is noteworthy that the Massachusetts chapter of the official Republican National Committee auxiliary, the National Black Republican Council, has filed a brief *amicus curiae* in support of the granting of this writ.

FEC urges that two leading arguments in the petition are "waived" because they were not advanced below. The authorities cited by FEC, and even the briefs before the Court of Appeals, contradict this contention.[1]

FEC also proposes, as "alternative grounds" supporting the judgment of the Court of Appeals, issues on which the district court has already ruled in petitioners' favor--rulings which the Court of Appeals did not disturb.[2]

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[1] FEC says at 8 n.3 that petitioners contend that the Civil Rights Restoration Act of 1987 "was intended to relax the constitutional standing requirements in Title VI cases" but this argument was "waived" because not presented below. Petitioners' claim is rather that the Act shows that Congress defined an injury--involvement of taxpayers' funds in discrimination--inconsistent with the Article III analysis that funding must cause the alleged discrimination. This argument was advanced in petitioners' brief below at 48-49.

FEC also contends at 14 n.6 that petitioners make the "odd assertion" that a lawsuit cannot be brought against a private party in the absence of agency-specific implementing regulations. This is not our contention, and we explicitly reject it. The argument is rather, as stated in the petition at 19 n.15, "Without regulations adopted by the Federal Election Commission, there is no law to apply to the facts of any complaint that may be brought before the Commission under Title VI of the Civil Rights Act of 1964."

The cases cited by FEC for the proposition that arguments not presented below are "waived" deal not with "arguments" but severable "claims." *Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984); *United States v. Levasco*, 431 U.S. 783, 788 n.7 (1977).

[2] FEC claims at 15 that the complaint also failed to allege participation in Republican Party affairs. The complaint (paras. 6-8) states that

The decision below, if unreviewed, would, by making federal funding a causal element of Title VI liability, substantially obstruct not only this petitioner but any Title VI complainant from seeking the protection of the Civil Rights Act of 1964. Because of this, it is unfortunate that the Solicitor General has delegated away his responsibility to represent the United States. Given the importance of this case, and the technical grounds on which it has been dismissed, this Court should not be obliged to evaluate its merits from manifestly adversarial representations. The Solicitor General has recently expressed reservations where application of the redressability element of Article III restricts legislatively mandated citizen enforcement of an Act of Congress.[3] This Court should request a submission from the Solicitor General on whether this petition should be granted.

Respectfully submitted,

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petitioners lobbied at national party conventions for over ten years, and even won a motion for an official party study of the rules in 1984.

[3] In *Branton v. Federal Communications Comm'n,* No. 93-1047, on petition for certiorari from a decision by the United States Court of Appeals for the District of Columbia Circuit adopting a similarly strict test for redressability--*see* 993 F.2d 907, 910-11 (D.C. Cir. 1993)--the Solicitor General expressed the view that "the court of appeals' analysis was flawed." Id., Opp. to Pet., 9. However, he opposed granting that petition for lack of a "well-developed factual setting" and because petitioner "did not specify what sanctions he sought from the FCC." Id., 10. By those criteria the petition herein should be granted.